

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1417

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

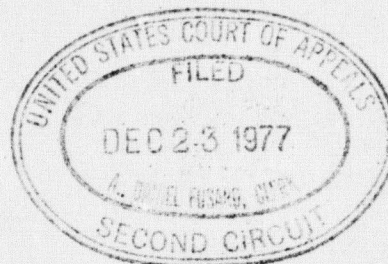
Plaintiff-Appellee,

-against-

ARNOLD B. MOSKOWITZ,

Defendant-Appellant.

Docket No. 77-1417



APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

APPEAL

U.S. District Court
DATE Assigned
U.S.
vs.
Disp./Sentence

77CR 51

ARNOLD B. MOSKOWITZ
(LAS), FIRST, MIDDLE

Case Filed
Mo. Day
1 28
No. of Del.
* 1
JUVENILE

NEAKER
BRANSHILL
Docket No.

U.S. MAG. CASE NO. 76 M 1621

BAIL • RELEASE
☐ AMT ☐ Fugitive
Denied ☐ Set ☐ Pers. Recog.
☐ PSA
\$200,000
Date 8-12-76
☒ Bail Not Made
☒ Status Changed (See Docket)
☐ 10% Deposit
☒ Surety Bond
☐ Collateral
☐ 3rd Ptry Cust
☐ Other

U.S. TITLE/SECTION 18:2113(a)(d) Bank robbery and use of dangerous weapon
ORIGINAL COUNTS 2

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Begun 8-12-76 Summons Served First Appearance	High Risk Date 1-28-77 Indict. Waived In Charging District Superseding Indict/Info	4/1/77 1st Plea Final Plea	Trial Set For 7/18/77 VING G NOL G Plea W/Drawn VING G NOL Vair Dire Trial Began Trial Ended 7.27.77

SENTENCE
Disposition of Charges 7.27.77 ☒ Convicted ☐ Acquired ☐ Dismissed ☐ On All Charges ☐ On Lesser Offense(s) ☐ WOP ☐ WP ☐ On Government Motion

MAGISTRATE		OUTCOME:
Search Warrant Issued Summons Issued Arrest Warrant Issued COMPLAINT OFFENSE (In Complaint)	DATE 8-10-76 8-10-76 INITIAL/NO. ASC/07E ASC/07E Bank Robbery. T-18 USC Sections 2113(a) and 2113(d).	INITIAL/NO. VAC 070A ASC 070B DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Barry Schulman

ATTORNEYS
Windels & Marx, Esqs.
50 West 51st St. NYC 10019
(212) 977-9600
By: Sheldon I. Hirshon

Chester Mirsky
80 Fifth Avenue, NYC. 10011
Suite 1502

* Show last names and suffix numbers of other defendants on same indictment/information:

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
8-16-76		Chester Musky, Esq. (Ret) by Deft. 80 5th Avenue NYC. Bail reduced to permit posting deed to house plus \$20,000 Cash.	
8-17-76		Money deposited. Deft released. Receipt No. 084820. Hearing scheduled August 23, 1976 at 2:00 PM. (**Hearing adjourned to September 16, 1976 at 2:00 PM at request of D.C. on consent of AUSA - Letter of confirmation recd. and on file from AUSA Schulman)	
9-14-76		See memorandum on file - from Marion Gutman, PreTrial Officer, requesting that curfew be lifted for September 14, 1976. This has been approved by the Magistrate - A. Simon Chrein.	
9-17-76		Case adjourned to September 30, 1976 at 2:00 PM at request of D.C. Mirsky.	
9-30-76		On oral motion of AUSA Schulman complaint dismissed - Dismissal order on file Copies sent to attys.	
1-28-77		Before CATOGGIO J - Indictment filed	

1417

DATE	DOCUMENT NO.	PROCEEDINGS (continued)	PAGE T	V. EXCLUDABLE DELAY			
				Interval Section II (a)	Start Date End Date (b)	Ltr Code (c)	True Days (d)
2.77		By Chrein, A.- Order for Acceptance of Cash Bail filed.					
-1-77		Before CHREIN J - case called - deft arraigned and enters a plea of not guilty - adjd before Judge Neaher to 3-4-77 at 10:00 am - deft released on \$100,000 personal surety bond secured by \$20,000 cash plus deed to parents home					
4.77		Before Neaher, J.- Case Called. Deft. & Counsel present. Case adjd. to 7.5.77 at 10:00 A.M. for Trial. Case adjd. to 5.13.77 at 2:00 P.M. for Hearing on Motion			3.14.77	E	
4.77		Notice of Motion for Discovery and Inspection, Bill of particulars, and to suppress certain evidence filed and forwarded to Chambers.					
7.77		Memorandum of Law in Support of Deft's. Omnibus Motion for Bill of Particulars Discovery and Inspection, and Suppression Identification Testimony filed and forwarded to Chambers.					
10/77		Notice of readiness for trial filed.					
4.4.77		Before Neaher, J.- Case Called. Deft. & Counsel present. Case adjd. to 5.13.77 at 2:00 P.M.					
4-8-77		By Neaher, J - Memorandum Order filed denying defts application for an order directing the Federal Bureau of Investigation to respond to the request for disclosure and to supply an inventory of documents withheld pursuant to the Freedom of Information Act. Copies forwarded.					
4.29.77		Supplemental Memorandum of Law in Support of Deft's. Omnibus Motion filed and forwarded to Chambers.					
5.6.77		Government's Response to Deft. Moskowitz's motion for Discovery and Bill of Particulars filed and forwarded to Chambers.					
5.12.77		Memorandum of Law in Support of the Government's Response to Deft. Moskowitz's motion for bill of particulars and discovery and inspection filed and forwarded to Chambers.					
5/13/77		Before Bramwell, J-case called-defts motion for bill of particulars & for discovery & inspection etc-motion argued-motion granted & denied as indicated on the record-settle order on notice.jlj			5/13/77	E	
13/77		Affidavit of John Colin filed re in opposition to deft's subpoena ret 5/13/77 in this court. jlj					
25-77		Alibi Notice filed: Motion to dismiss the indictment together with defts Memorandum of Law filed in support of Motion (forwarded to Chambers)					
26-77		By NEAHER, J. - Memorandum Order filed denying motion for reduction of sentence. Copies forwarded to chambers.					

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

LETTER
For
Per
admi
U.S.
A. Ex
B. N
C. St
D. W
E. H
F. T
G. De
H. M
I. F
M. U
N. P
O. P
P. S
R. D
T. C
U. T
W. G

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE	
		(a)	(b)
	(Document No.)		
5-26-77	Copy of letter filed dated May 25, 1977 from Barry Schulman, Asst. U.S. Atty. to Chester Mirsky, counsel, re notice of alibi etc.		
5-26-77	By Bramwell, J - Order filed on defts motion for discovery, bill of particulars, suppression certain evidence, etc. granted and denied in part as indicated in Order., and further ordered that the US atty endorse the Order, submitted to this Court, granting permission to inspect the jury clerk records pursuant to 28:1867(a)(f) and return same to this Court.		
5-26-77	By Bramwell, J - Supplemental order filed 14(a) The names and addresses of any persons known by the Govt who are not to be called as govt witnesses at the trial and who claim to have seen the deft either waiting to transact business of otherwise present at the Chemical Bank subsequent to the robbery on June 3, 1977.		
5/27/77	Copy of letter of AUSA Schulman to Bramwell, J dtd 5/27/77 filed re discovery and inspection and bill of particulars.jlj		
5.31.77	By Bramwell, J.- Order filed that John Lupiano permit the deft's. atty to inspect, reproduce and copy the contents of such records or papers as are used by the Jury clerk in connection with the jury selection process.		
6.03.77	Letter filed received from Chambers addressed to Judge Bramwell, from Chester L. Mirsky dated 6.1.77 as per their conversation with his office of 6.1.77. withdrawing his request to obtain and copy records of the jury clerk.		
6/6/77	CC of letter of AUSA Schulman to Bramwell, J dtd 6/6/77 filed re discovery and inspection and bill of particulars.jlj		
6.13.77	Before Bramwell, J.- Case Called. Deft. & Counsel present. Case adjd. to 7.5.77 for Trial Excludable Delay charged to Deft. under Code 'G'.		6/13/77
6/17/77	Supplemental affidavit of Chester Mirsky filed re in support of motion of dismissal of indictment.jlj		6/24/77
6.22.77	Affidavit in Opposition to Deft's. motion to dismiss indictment filed and forwarded to Chambers.		
6-24-77	Memorandum of Law filed in support of defts motion to exclude the police artist sketch as evidence, etc. (forwarded to Chambers)		
6/24/77	Before Bramwell, J-case called-deft & counsel present motion argued-motion denied-settle order on notice.jlj		
6-24-77	Notice of motion filed for suppressing evidence		
6-27-77	Memorandum of Law filed in support of admissibility of expert testimony on eyewitness identification filed.		
7.1.77	Requested Voir Dire Questions filed and forwarded to Chambers.		
	kindly turn over....		

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
7.05.77	Before Bramwell, J.- Case Called. Deft. not present. Counsel present. Case adjd. to 7.11.77 at 10:00 A.M. for Trial.				gp
7/11/77	Before Bramwell, J-case called-deft & counsel present case adjd to 7/18/77 for trial.jlj				
7-18-77	Before Bramwell, J - case called - suppression hearing begun - decision reserved -Wade hearing begun - hearing held and contd to July 19, 1977 at 9:30 am.				
6.19.77	Before Van Graafeiland, C.J.- Case Called. Deft. & Counsel present. Wade hearing continued. Wade hearing concluded. Jury selection begun. Continued to 7.20.77.				gp
7-20-77	Before Van Graafeiland - case called - deft & counsel present - Jury selection contd - Jurors selected and sworn - trial ordered and begun - trial contd to 7-21-77				
7/21/77	Before Van Graafeiland, C.J-case called-deft & counsel present-trial resumed-trial contd to 7/22/77.jlj				
7/22/77	Before Van Graafeiland, C J-case called-deft present w/ counsel-trial contd-govt rests-trial contd to 7/25/77.jlj				
7-25-77	Before Van Graafeiland, J - case called - deft present with counsel Chester Mirsky - trial resumed -trial contd to 7-26-77.				
7-26-77	Before Van Graafeiland, C J - case called - trial resumed - Govt rests - deft rests - trial concluded - summations 7-27-77 at 10 am.				
7.27.77	By Van Graafeiland, C.J. Order of Sustenance filed.				gp
7.27.77	Stenographer's Transcript dated June 24th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 18th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 22nd, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 19th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 19th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 26th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 20th, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 21st, 1977 filed.				gp
7.28.77	Stenographer's Transcript dated July 25th, 1977 filed.				gp
7.27.77	Before Van Graafeiland, C.J.- Case Called. Deft. & Counsel present. Deft. moves for judgment of acquittal - denied. Govt. sums up. Deft. sums up. Jury charged. Alternate jurors discharged. Jury deliberates 1:15 P.M. Jury returns at 4:00 P.M. for the reading of testimony. Jury returns at 5:35 P.M. with a verdict. Jury finds deft. GUILTY on Count 1 and GUILTY on Count 2. Jury discharged. All motions to be made in September, date unknown at this time. Bail continued.				gp
8-8-77	Transcript filed dated July 27, 1977 (pgs 1245 to 1370)				
	continued.....				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

MOSKOWITZ, Arnold B.

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Docket No.

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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
	(Document No.)				
9.12.77	Notice of Motion for Judgment of Acquittal returnable 9.16.77 at 10:00 A.M. filed and forwarded to Judge Van Graafeland's Chambers.				GP
9.12.77	Memorandum in Support of Deft's. motion of Judgment of Acquittal filed and forwarded to Chambers.				GP
9.12.77	Pre-Sentence Memorandum filed and forwarded to Judge Van Graafeland's Chambers.				GP
9.16.77	Before Van Graafeland, J.- Case Called. Deft. & Counsel present. Deft's. motion to set aside conviction argued and denied. Deft. is sentenced for Study and Observation pursuant to Title 18, United States Code, Section 5010(e). Execution of sentence stayed pending appeal. Bail continued.				GP
9.16.77	Judgment and Commitment filed. Certified copies to Marshal and Probation.				GP
9.16.77	Notice of Appeal filed.				
9.16.77	Duplicate Copy of Notice of Appeal together with Certified Copy of Docket entries mailed to the Court of Appeals with Form A.				GP
9.16.77	Financial Affidavit filed.				GP
9-23-77	Stepographer's transcript dtd 9-16-77 filed.mm				
10-20-77	Crim: appeal scheduling order ret 11-7-77 filed. mg				
10-27-77	Transcript filed dated July 5, 1977				
11-14-77	Record on appeal certified and mailed to the c of a				

A TRUE COPY ATTEST
11/14/77
LEWIS ORFEL
BY *Core Smith* CLERK
DEPUTY CLERK

TRP:BES:ma
F.# 763,106

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

77CR 51

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I N D I C T M E N T

UNITED STATES OF AMERICA

Cr. No. _____

(T. 18, U.S.C., §2113(a)(d))

- against -

ARNOLD B. MOSKOWITZ,

Defendant.

FILED
IN CLERK'S OFFICE
S. DISTRICT COURT E.D. N.Y.

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★ JAN 28 1977 ★

THE GRAND JURY CHARGES:

TIME A.M.
P.M.

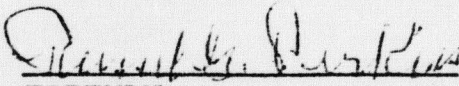
COUNT ONE

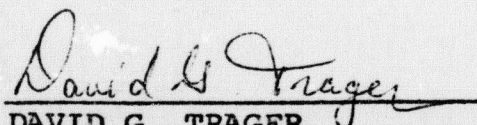
On or about the 3rd day of June, 1976, within the Eastern District of New York, the defendant ARNOLD B. MOSKOWITZ knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chemical Bank, 2730 Coney Island Avenue, Brooklyn, New York, approximately Two Hundred Seventy Nine Thousand Dollars (\$279,000.00), in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank the deposits of which Chemical Bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, §2113(a)).

COUNT TWO

On or about the 3rd day of June, 1976, within the Eastern District of New York, the defendant ARNOLD B. MOSKOWITZ knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 2730 Coney Island Avenue, Brooklyn, New York, approximately Two Hundred Seventy Nine Thousand Dollars (\$279,000.00) in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank the deposits of which Chemical Bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant ARNOLD B. MOSKOWITZ did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, S2113(d)).

A TRUE BILL


FOREMAN


DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

SAMR1
PA/Elp.

THE COURT: Do you want to bring the jury in?

(Whereupon the jury entered the courtroom.)

THE COURT: Members of the jury, now that you've heard the evidence and the arguments of counsel, the time has come for me to instruct you as to the law governing this case.

Although you as jurors, are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court, and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment, and the denial made by the "Not Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion.

Charge of the Court

The accused and the public expects that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

The issues of fact which you are to decide have been created by the filing of an indictment and the defendant's plea of not guilty to the charges contained therein.

As I have explained to you, an indictment has absolutely no significance insofar as the question of defendant's guilt is concerned. It is simply the method by which the defendant is accused. It is not to be considered by you as evidence of the defendant's guilt. Neither does it create any presumption or permit any inference of guilt.

On the issues which you are about to decide, the indictment -- which I will shortly read to you -- should be accorded no weight or significance whatsoever. By his plea of not guilty, the defendant has denied the allegations of the indictment, and put the Government to its burden of proof, which I will explain further to you, as to establish the defendant's guilt beyond a reasonable doubt.

The indictment is in two counts, and both

Charge of the Court

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2 relate to the same incident. They differ from each
3 other in that in the first count the defendant is
4 charged with the use of force violence and intimidation
5 in taking from employees of the Chemical Bank, money
6 which was in the bank's custody or possession; where-
7 as Count two charges that in so doing, the defendant
8 assaulted and placed in jeopardy the lives of the
9 bank employees and other persons present by use of
10 a dangerous weapon. You must consider each count
11 separately and bring in a separate verdict on each
12 count.

13 Now, Count one is drawn under subdivision A of
14 Section 2113 of Title 18 of the United States Code,
15 which provides, so far as is here relevant as follows,
16 and I quote, "Whoever, by force and violence or by
17 intimidation takes from the person or presence of
18 another any money belonging to or in the care, custody
19 control, management or possession of any bank, shall
20 be fined or imprisoned or both."

21 Count one of the indictment drawn under sub-
22 division A, which I have just read to you reads as
23 follows; and now I will read you Count one of the
24 indictment:

25 "On or about the 3rd day of June, 1976, within

Charge of the Court

the Eastern District of New York, the defendant Arnold B. Moskowitz, knowingly and wilfully, by force, violence and intimidation did take from the person and presence of employees of the Chemical Bank, 2730 Coney Island Avenue, Brooklyn, New York, approximately \$279,000.00 in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which Chemical Bank were then and there insured by the Federal Deposit Insurance Corporation."

Count two of the indictment is drawn under Section 2113 subdivision D, which in relevant part provides as follows, and I quote, "Whoever in committing any offense defined in subdivision A of this section, assaults any person or puts in jeopardy the life of any person by use of a dangerous weapon shall be fined or imprisoned or both."

Count two of the indictment is exactly like Count one, except that it adds the new element about assault, and putting life in jeopardy by the use of a dangerous weapon. Count two reads as follows:

"On or about the 3rd day of June, 1976, within the Eastern District of New York, the defendant Arnold B. Moskowitz knowingly and wilfully, by force,

5 1
2 violence and intimidation, did take from the person
3 and presence of employees of the Chemical Bank, 2730
4 Coney Island Avenue, Brooklyn, New York, approximately
5 \$279,000.00 in United States currency, which money
6 was in the care, custody, control, management and
7 possession of the said Chemical Bank, the deposits
8 of which Chemical Bank were then and there insured
9 by the Federal Deposit Insurance Corporation, and
10 in commission of this act and offense, the defendant
11 Arnold B. Moskowitz did assault and place in jeopardy
12 the lives of the said bank employees as well as the
13 lives of other persons present by use of a dangerous
14 weapon."

15 In each of these counts, and in the statute
16 itself, the word "Bank" means any bank, the deposits
17 of which are insured by the Federal Deposit Insurance
18 Corporation. There is no controversy as to whether or
19 not the deposits of the Chemical Bank were insured
20 by the Federal Deposit Insurance Corporation. The
21 parties here to have stipulated that the deposits
22 were so insured.

23 Now, the essential elements of Count one of
24 the indictment, all of which the Government must
25 prove beyond a reasonable doubt or else you must

Charge of the Court

acquit the defendant on Count one of the following:

First, that the defendant took money from the bank employees. Second, that the money when the defendant took it was in the bank's possession;

And third, that the defendant took the money by force and violence or by intimidating the bank employees.

If the Government proves each of these essential elements of Count one beyond a reasonable doubt, you will convict the defendant on Count one. If on the other hand, the Government fails to prove any one or more or all of the essential elements of Count one beyond a reasonable doubt, then you must acquit the defendant on Count one.

The statute requires proof that the defendant took money from the person or presence of another person. The Government does not have to show that the defendant snatched the money from the hand or presence of another person. It is enough if it shows that the defendant got the money from the bank employees without permission and against their wills. If you are satisfied that the employees handed the money over to him so that the defendant received it from their hands, that can never be a taking if

Charge of the Court

the employees surrendered it in response to defendant's demand, and against their own wishes. That is, if they handed it over unwillingly and because they saw no practical alternative to doing so at that time.

The statute also requires proof that the money taken was in the custody or possession of the bank at the time of taking. This is sufficiently proved if the Government establishes beyond a reasonable doubt that the money taken was properly in the bank in the usual course of bank business and was part of the money that the bank employees were handling in the ordinary course of their work for the bank.

Finally, the statute requires proof that the defendant used force and violence or intimidation. The Government need not show that the defendant used all three. It is enough if the Government establishes beyond a reasonable doubt that the defendant used intimidation to get the money from the bank employees to get them to turn the money over to him.

What the Government must show here is that the defendant used words and performed acts which would produce in the ordinary person in the position of the bank employees a fear of bodily harm, and that the defendant did that intentionally in order to get

Charge of the Court

the employees to do what he wanted them to do; that is, to pass the money over to him.

The test here is the nature of the activities that were proven. That is, the kind of words that were used and the sort of actions that were taken. They must be shown to be such as would induce fear in the mind of an ordinary person. It would not be enough if you concluded only that because the employees were accessibly timid or were mistaken in their impressions, that they felt fear where persons of ordinary temperment would not have been put in fear. Let me repeat this briefly. The essential elements of Count one; first, that the defendant took money from the bank employees; second that the money when the defendant took it was in the bank's possession; third that the defendant took the money by force and violence or by intimidating bank employees.

You must consider the evidence and determine from it whether the Government has proven all of the essential elements of the offense beyond a reasonable doubt. If you conclude that the Government has proved all three elements which I have just read to you, your verdict on Count one will be guilty. If you conclude that the Government has failed to prove any

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2 one or more or all of the essential elements of Count
3 one, then you must acquit the defendant on Count one,
4 and you must also acquit him on Count two since that
5 count requires proof of all the elements of Count one,
6 plus one additional element.

7 The essential elements of Count two, as I
8 just pointed out, are exactly the same as those of
9 Count one, plus the element of assault or putting life
10 in jeopardy by use of a dangerous weapon. So as
11 I have pointed out to you, you do not reach Count
12 two at all unless you are satisfied that the
13 Government has proved all the elements of Count one.

14 Now then, what are the essential elements of
15 Count two? The essential elements of Count two, all
16 of which the Government must prove beyond a reasonable
17 doubt or else you must acquit the defendant on Count
18 two are the following:

19 First, that the defendant took money from
20 the bank employees; second, that the money when the
21 defendant took it was in the bank's possession;
22 third, that the defendant took the money by force and
23 violence or by intimidating the bank employees; and
24 fourth that the defendant assaulted or placed in
25 jeopardy the life of one or more of the bank employees

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2 or other persons, then in the bank, by use of a danger-
3 ous weapon in carrying out the robbery.

4 If the Government proves each of these
5 essential elements of Count two beyond a reasonable
6 doubt, you will convict the defendant on Count two.
7 If the Government fails to prove any one or more or
8 all of the essential elements of Count two beyond a
9 reasonable doubt, then you must acquit the defendant
10 on Count two.

11 (continued next page)
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T5AM/2
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Charge of the Court

1337

I have already explained each of the elements which must be proved in both counts one and two. The additional that must be proved under count two is that a person's life was placed in jeopardy by the use of a dangerous weapon. That requires proof beyond a reasonable doubt that in the perpetration of the alleged robbery a weapon that was capable of inflicting a fatal injury was used, and it was used against some one or more persons in the bank in such manner and at such distance that the person or persons against whom it was used was exposed to the risk of being killed by the weapon. The Government need not prove that the defendant intended actually to use the weapon if he met resistance. To establish the defendant's guilt under count two, the Government must, however, show beyond a reasonable doubt that the weapon was used as a means of committing the alleged robbery; that it was an operable weapon, and that if it was so used against one or more persons it could have inflicted fatal injury.

Now, again I will repeat the essential elements of count two so you will be sure to remember them. First, that the defendant took the money from the bank employees; second, that the money when the

Charge of the Court

2 1
2 defendant took it was in the bank's possession:
3 third, that the defendant took the money by force
4 and violence or by intimidating bank employees; and,
5 fourth, that the defendant assaulted or placed
6 in jeopardy the life of one or more of the bank
7 employees or other persons then in the bank by use
8 of a dangerous weapon in carrying out the robbery.

9 Now, the burden is upon the Government to
10 prove defendant guilty of the crime with which he
11 is charged. The defendant does not have to prove
12 his innocence. The burden of proving the defendant
13 guilty beyond a reasonable doubt never shifts from
14 the Government during the trial. Whether the burden
15 of proof resting upon the Government is sustained
16 depends not upon the number of witnesses nor on the
17 quantity of the testimony, but on the nature and
18 quality of the testimony, whether from the defendant's
19 witnesses or from the Government's witnesses.

20 The question that naturally comes up is what
21 is a reasonable doubt. The words almost define
22 themselves, that there is a doubt formed in reason
23 and arising out of evidence in the case or the lack
24 of evidence. It is a doubt which a reasonable person
25 has after carefully weighing all the evidence. It

Charge of the Court

means a doubt that is substantial and not merely shadowy. Beyond a reasonable doubt does not mean with a positive certainty or beyond all possible doubt. If that were the rule, few men however guilty would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt. If after a fair and impartial consideration of all the evidence you can candidly and honestly say that you are satisfied of the guilt of the defendant, that you do have an abiding conviction of the defendant's guilt, such conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and in that circumstance it is your duty to convict. On the other hand, if after a fair and impartial consideration of all the evidence, you cannot candidly and honestly say that you are satisfied of the guilt of the defendant, that you have such doubt as would cause prudent persons to hesitate before

Charge of the Court

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2 acting in matters of importance to themselves,
3 then you have a reasonable doubt, and in that
4 circumstance it is your duty to acquit.

5 A defendant in a criminal case is not called
6 upon to prove his innocence, since the burden is
7 upon the Government to prove the accused guilty
8 beyond a reasonable doubt of every essential element
9 of the crime charged.

10 The defendant has the right to rely upon the
11 failure of the prosecution to establish such proof.

12 A defendant may also rely upon evidence brought
13 out on cross-examination of the Government's witnesses.
14 The law does not impose upon the defendant the duty
15 or producing any witnesses. Furthermore, if the
16 defendant does produce witnesses the burden does
17 not shift to him to prove his innocence. You must
18 consider the evidence presented by the defendant along
19 with all the evidence in the case in determining
20 whether a reasonable doubt exists, that the defendant
21 is guilty of the charge.

22 As I have already instructed you, every person
23 accused of a crime is presumed to be innocent until
24 proven guilty beyond a reasonable doubt. That
25 presumption of innocence was with this defendant

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when he was first arraigned in this Court. It has continued with him throughout this trial, while he is at the table with his counsel today he continues in the eyes of the law to be presumed not guilty. That presumption must continue with you, ladies and gentlemen, when you go to the jury room, and up to the moment that you reach your verdict. That presumption of innocence remains in a criminal case unless and until overcome by evidence satisfying you beyond a reasonable doubt that the defendant committed the crime charged against him. Unless the evidence in support of the charges against the defendant is clear, convincing and sufficiently strong to convince you beyond a reasonable doubt that the defendant is guilty, you must acquit him of such charges. A verdict of guilty is permissible only if the jury's belief of his guilt has ripened into a belief beyond a reasonable doubt. This presumption of innocence, as I have indicated, continues throughout the trial, and throughout the jury's deliberations, unless and until it is overcome by the evidence, and inferences reasonably drawn from the evidence to the exclusion of a reasonable doubt.

Now, the evidence in this case consists of

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2 the sworn testimony of the witnesses, all of the
3 exhibits which have been received in evidence and
4 all facts which have been admitted or stipulated.
5 Any evidence to which an objection was sustained
6 by the Court, and any evidence ordered stricken by
7 the Court must be entirely disregarded. As I have
8 told you before, statements and arguments of counsel
9 are not evidence in this case unless made as an
10 admission or stipulation of fact.

11 Now, evidence may be either direct or circum-
12 stantial. Direct evidence is where a witness testi-
13 fied to what he saw, heard or observed; what he knows
14 of his own knowledge, something which comes to him
15 by virtue of his senses.

16 Circumstantial evidence is evidence of facts
17 and circumstances from which one may infer connected
18 facts which reasonably follow in the common experience
19 of mankind. Stated somewhat differently, circum-
20 stantial evidence is that evidence which tends to
21 prove a disputed fact by proof of other facts which
22 have a logical tendency to leave the mind to a
23 conclusion that those facts exist which are thought
24 to be established. Circumstantial evidence, if
25 believed, is of no less value than direct evidence,

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for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant.

Now, let us take a simple example, one which is often used in this courthouse, to illustrate what is meant by circumstantial evidence. We will assume, and this is a fair assumption, that when you entered the courthouse this morning the sun was shining brightly outside, and it was a clear day. There was no rain. The sky was clear. Now, assume, and this is also a fair assumption, that in this courtroom the blinds are drawn, the drapes are drawn, you cannot look outside. Assume as you are sitting in this jury box, despite the fact that it was sunny when you entered the building, somebody walks into the building with an umbrella dripping water, followed a short time later by a man with a raincoat, which raincoat was wet. Now, in our assumption, you cannot look out of the courtroom and see whether it's raining or not raining, and if you are asked if it is raining you cannot say whether you know it directly by your own observation, but suddenly upon the combination of facts as given, even though when you entered the building it was not raining outside. It would be reasonable and logical for you to conclude

Charge of the Court

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2 that it is raining now. That is about all there is
3 to circumstantial evidence.

4 You infer on the basis of reason and experience
5 from an established fact the existence of some
6 further fact. There are times when different
7 inferences may be drawn from facts, whether they
8 are proved by direct or circumstantial evidence.
9 The Government asked you to draw one set of inferences,
10 while the defendant asked you to draw another. It is
11 for you to decide, and for you alone, what inferences
12 you will draw.

13 In weighing the evidence you may use the test
14 you ordinarily use in determining the truth of
15 matters important to you in your everyday life. You
16 may consider the demeanor of the witnesses on the
17 stand; any interest which they may have in the outcome
18 of the case; any bias or prejudice for or against
19 any party; their opportunity to observe; any reason
20 to remember or forget; the inherent probability of
21 their story; its consistency or lack of consistency,
22 and its corroboration or lack of corroboration with
23 other credible evidence.

24 In this connection, you may also bear in mind
25 that if you should find that any witness has

Charge of the Court

deliberately testified falsely on any material point, you may take that into consideration in determining whether he has testified falsely on other points. Simply, because you find that a witness has not testified with respect to one fact accurately, it does not necessarily follow that he is wrong on every other point. A witness may be honestly mistaken on one point of his testimony and be completely accurate on others. But, if you do find that a witness has deliberately lied on any material point, it is hardly natural that you should be suspicious of his testimony on all points. Under these circumstances you are entitled to disbelieve his entire testimony, or you may accept that part which you do believe and disregard the rest.

Passing on the credibility of a witness, you may consider whether that witness has any bias or interest in the outcome of the case, and if so, whether he has committed that bias or interest to color his testimony.

(Continued on next page.)

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It does not follow simply from the fact that a witness does have a bias or an interest in the outcome of the case that his testimony is to be disbelieved. There are many people who no matter what their interest in the outcome of the case may be would never testify falsely. On the other hand you should always bear in mind if a witness has a decided bias or interest in the outcome of the case, that may offer something of a temptation to shade his testimony in accordance with his bias, or sway him to advance his own interest. That may even be that his bias or interest has so operated on his mind that he has come to believe what he wants to believe. He may therefore slant his testimony or even testify falsely without consciously realize it.

If any witness whose credibility you are testing has some bias or some interest in the outcome of the case, that fact is one which you may take into consideration in weighing his testimony.

These tests which I have just described to you may be applied to the testimony of the defendant in the same manner as they are applied to the testimony of other witnesses who testified.

Now, on a number of occasions during the

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trial it was necessary for me to make rulings on questions of law. Please do not infer from my rulings or any question I may have asked or statements I may have made that I favor one side or the other in this lawsuit. My purpose was solely to help the attorneys abide by the rules of evidence or to clarify the issues.

From time to time as you observed, conferences were conducted at the end of the bench here. These conferences dealt solely with questions of law and trial procedure. No inferences of any sort are to be drawn because of such conferences or because of the requesting by either counsel that a conference be held.

Now the issues in this case are squarely before you, and for this reason I will not attempt to summarize the evidence for you. In any event it will be your recollection of the evidence rather than mine which would control. Should you have any uncertainty as to any of the evidence presented during the trial you may request that a portion or portions of the testimony be read to you by the court reporter.

Now, as you are well aware, the central issue in this case concerns the identification of the

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2 defendant as the perpetrator of the bank robbery.
3 You have heard the Government witnesses identify
4 the defendant as the perpetrator, and you have
5 heard the defendant deny that he was there. You
6 have also heard a good deal of testimony as to the
7 manner in which the defendant was identified in the
8 course of the investigation of this case by the
9 New York City Police Department, and the FBI.

10 The Government has the burden of proving that
11 the accused, Arnold Moskowitz, committed the crime.

12 You the jury must be satisfied beyond a reasonable
13 doubt that the accused was the perpetrator of the
14 crime before you may convict. If you are not con-
15 vinced beyond a reasonable doubt you must -- then
16 you must find the accused not guilty.

17 Identification testimony is an expression
18 of belief or impression by the witness. Its value
19 depends on the opportunity the witness had to observe
20 the offender at the time of the offense and to make
21 a reliable identification later.

22 In approaching the task of evaluating the
23 identification testimony in this case you should
24 consider all the evidence, including the testimony
25 as to the witnesses' observations of the perpetrator

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2 made at the time of the robbery, and the identifica-
3 tions which they made during the police investigation
4 after the robbery. In other words you should consider
5 the whole history of the identification process in
6 this case in reaching your decision, not simply
7 the identifications made by the witnesses here in
8 the courtroom.

9 As to the identification at the time of the
10 robbery you should consider the following factors
11 among others: The opportunity of the witnesses to
12 view the perpetrator. In this regard you may consider
13 how close the witnesses were to him, how much time
14 they had to observe him, the lighting conditions,
15 and other factors of that nature. You may also
16 consider whether during the time in which the
17 witnesses were able to observe the perpetrator
18 they were involved in other activities which might
19 have distracted their attention. You should consider
20 the degree of attention given to the perpetrator by
21 the witnesses. In this regard you may consider
22 whether a casual or passing observer would be less
23 likely to note a person carefully than one who is
24 involved in a transaction with him. You may also
25 consider whether an observer who has had opportunities

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2 in the past to note or meet the person in question,
3 might more readily identify him if he saw him again.
4 You should also consider whether the witnesses
5 observations were made under circumstances of emergency
6 or emotional stress. If you find that they were,
7 you should consider whether this caused the witnesses'
8 recollections to have become distorted in any way.
9 You should consider the accuracy of the initial
10 description given of the perpetrator by the witnesses.
11 You should consider how detailed these descriptions
12 were, how closely they matched the defendant in
13 terms of light, color of hair, complexion, or other
14 distinguishing features, and how similar the descrip-
15 tions of the perpetrator were among the various
16 witnesses.

17 You may also consider in this regard whether
18 initial descriptions made close to the event in
19 question are more likely to reflect what the witnesses
20 saw than later ones. In determining the accuracy of
21 the identifications you should also consider the
22 subsequent identifications by the witnesses during
23 the police investigation. You should determine
24 whether in this case the witnesses who identified the
25 defendant as the perpetrator did so as a result of

Charge of the Court

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2 their independent recollection that he was the
3 perpetrator of the bank robbery, and not because they
4 were persuaded to do so by the police or the FBI.
5 In other words you should determine whether the
6 identification procedures were fair enough so that
7 the witnesses were able to select the defendant as
8 the perpetrator because of their independent recol-
9 lection of the event in question, and not because of
10 the identification procedures followed by the
11 police or the FBI.

12 Several identification procedures were used in
13 this case. There was a composite drawing made of the
14 perpetrator from descriptions given by the witnesses.
15 There were various photographic displays shown to the
16 witnesses and there was a line-up of a picture of
17 which you have seen.

18 In reviewing these procedures you should
19 consider how certain the witnesses were of the
20 identifications which they made, and the amount of
21 time which elapsed between the crime and the identi-
22 fication. You will recall that the first identifi-
23 cation procedure used in this case was the preparation
24 of a composite drawing of the perpetrator. In consid-
25 ering this drawing you should consider the extent

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if any, to which it includes and omits the distinguishing characteristics of the defendant. With respect to the photographic displays shown to the witnesses you should consider whether there were discrepancies between the defendant and the other participants in regard to age, weight, skin color, hair color, or smile and fashion of hair, and whether there were any other differences in photographs which might have tended to focus attention on the defendant.

You may also consider in reviewing the photographic identification whether defendant was a sole person whose picture was repeated in all of them.

As regards the line-up in the case, much of that which I have told you with respect to the photographic identification also applies. And particularly you should consider whether any identification procedures employed by the Government tended to focus attention on the defendant.

All of the factors I have discussed should be taken together and weighed by you. From them you should determine whether or not there is a reasonable doubt that the defendant was in fact the person identified here in Court by the Government's witnesses as the perpetrator of the robbery.

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Charge of the Court

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In this regard I again remind you that the Government is not required to prove that the accused was the perpetrator of the crime by proof beyond all doubt.

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The Government's burden is not to prove the identification of the accused with absolute certainty. The Government's burden is to prove that the accused was the perpetrator of the crime by proof beyond a reasonable doubt.

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Now the defendant, through his own testimony and that of his parents and sisters has attempted to show that at the time of the robbery of the Chemical Bank he was in bed at his home. If you believe this evidence you must find the defendant not guilty since he obviously could not have been in two places at one time. However, even if the defendant has not proven to your satisfaction that he was at home during the time the robbery was committed you may not on that account alone find him guilty. You may decide that there was insufficient evidence of the defendant's presence at home to convince you that he was there. You are not however to find the defendant guilty because he has not established his alibi defense to your satisfaction.

Charge of the Court

As I already pointed out to you, the defendant has no obligation whatever to prove to you that he was at home or indeed to prove any fact to you. The burden of proof is on the Government to prove beyond a reasonable doubt that the defendant is guilty as charged, and you must find the defendant not guilty if the Government has failed to meet this burden.

(Continued on next page.)

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2 THE COURT (Continuing): Thus, if the evidence
3 has created in your mind a reasonable doubt that the
4 defendant was present at the bank shortly before
5 9:00 A.M. on June 3, 1976, and entered it intending to
6 rob it, you must find the defendant not guilty.

7 Now, there is no dispute in this case that on
8 June 3, 1976, the day on which the Chemical Bank was
9 robbed, the defendant left New York City by air for
10 Florida. Nor is it disputed that the defendant
11 remained in Florida for approximately one week,
12 returning to New York by car on or about June 12th.
13 The question which you must decide therefore is not
14 whether the defendant left New York City for a week,
15 but why he did so. The Government claims that the
16 defendant left the City in order to avoid apprehension
17 and prosecution for robbing a bank. If you are
18 convinced that that is why the defendant left the
19 City then you may find that this flight demonstrated
20 a consciousness of guilt on the defendant's part.
21 The defendant is not, however, charged with the crime
22 of unlawful flight to avoid prosecution. Therefore,
23 should you find that the defendant did flee, you may
24 not find him guilty on the basis of his flight alone.
25 Rather, you may only consider this evidence as

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2 demonstrating a consciousness of guilt. You must then
3 weigh this factor with all the other evidence in the
4 case in determining whether the defendant is guilty or
5 innocent of the crime with which he is charged.

6 The defendant, on the other hand, claims that
7 his departure had been planned for some time and that
8 it had nothing to do with the robbery of the bank.
9 If you believe this to be the case, if you are not
10 convinced that the defendant left New York with the
11 intent to flee, then of course you may draw no
12 inference whatsoever against the defendant because of
13 a trip to Florida. In instructing you as I have on the
14 subject of flight, I want to make it absolutely clear
15 that I do not declare to you or even remotely suggest
16 that the defendant did indeed take flight on June 3,
17 1976, or at any other time. This is an issue for you
18 to determine from all of the evidence in the case.
19 Unless you find that the defendant did take flight you
20 will entirely disregard the instructions which I have
21 just given you concerning any inferences which you may
22 draw therefrom.

23 Now, this case is important, both to the
24 Government and to the defendant. It is not for the
25 jury nor the Court to appraise the wisdom or the

1 propriety of the statutes which are here involved.
2
3 They were enacted by the Congress of the United States.
4 I am obliged by my oath to uphold the Constitution and
5 the laws of the United States.

6 You, ladies and gentlemen, likewise are duty-
7 bound as jurors to apply the law, as you have been
8 advised by the Court, to the facts of this case as you
9 find them.

10 Take this case with you to the jury room.
11 Determine the facts on the basis of the evidence as it
12 has been presented to you. Apply the law as I have
13 attempted to outline it to you; then render a fair and
14 just verdict.

15 When you reach a verdict it must be unanimous.
16 In other words, all twelve jurors must agree before a
17 verdict can be rendered. It is the duty of each juror
18 to discuss and consider the opinions of other jurors.
19 Despite that, in the last analysis it is your individual
20 duty as an individual juror to make up your own minds
21 and to decide this case upon the basis of your own
22 individual judgment and conscience.

23 Before you commence your deliberations, as you
24 have gone into your jury room, elect one of your number
25 as Foreman. Then proceed to your consideration of the

1
2 case. You must render a separate unanimous verdict of
3 guilty or not guilty as to each count of the indictment
4 and you will recall there were two of them which I
5 explained in some detail. When you have reached a
6 verdict, inform the Clerk through the Bailiff. Then
7 return to the courtroom and then announce your verdict.

8 If it becomes necessary during your deliberations
9 to communicate with the Court you may send a note by
10 the Bailiff. Never attempt to communicate with the
11 Court except in writing, and bear in mind always that
12 you are not to reveal to the Court or to any other
13 person how the jury stands numerically or otherwise
14 on the question of guilt or innocence of the accused
15 until you have reached a unanimous verdict.

16 I am now going to ask you to retire for a few
17 minutes so that counsel may make any exceptions or
18 requests for additional instructions which they deem
19 appropriate.

20 After you have been recalled and again excused
21 you may commence your deliberations. You may go into
22 the jury room for a few minutes while I hear from
23 counsel.

24 (Jury leaves courtroom.)

25 MR. SCHULMAN: Nothing.

1 MR. MIRSKY: No additions or exceptions.

2 THE COURT: I might point out to you,
3 Mr. Mirsky, before I charged -- when I was talking
4 about instructions,, you said you wanted a general
5 exception noted, which --

6 MR. MIRSKY: No.

7 THE COURT: You have any objections or
8 exceptions?

9 MR. MIRSKY: My understanding of the law is if
10 I have any specific objections or exceptions I must
11 take them in and direct your attention to them. I
12 don't. I must tell you that I thought it was a fair
13 and reasonable charge.

14 MR. SCHULMAN: Fine here.

15 THE COURT: All right, fine.
16 Recall the jury.

17 (The following took place at the side bar.)

18 MR. MIRSKY: What do we do about the alternate?

19 THE COURT: As soon as the marshal takes his
20 oath, we will discharge alternates.

21 MR. MIRSKY: Very well.

22 MR. SCHULMAN: Your Honor, are you going to
23 request the alternates not to speak with counsel?

24 THE COURT: Pardon me?

25 MR. SCHULMAN: Are you going to request

1 the alternates don't speak with counsel?

2 THE COURT: I'm sorry.

3 MR. SCHULMAN: Are you going to request that
4 the alternates not speak with counsel at this time?

5 THE COURT: Yes.

6 MR. SCHULMAN: Okay.

7 (Side bar conference concluded.)

8 THE COURT: We have a marshal available who is
9 going to take care of this jury?

10 (Marshals stepping forward.)

11 (Marshals sworn by Clerk of the Court.)

12 THE COURT: Now I have forgotten the names of
13 our two alternates up there, but Jurors No. 13 and 14.
14 I don't have the names before me.

15 ALTERNATE JURORS: Yes.

16 THE COURT: Fortunately for everybody else,
17 and unfortunately for you, the twelve jurors have
18 weathered the storm well and they are now prepared
19 to go to -- into their deliberations, and as you know
20 we have juries of twelve, and you two are the extras,
21 so you will now be excused, and I suggest that you do
22 not discuss this matter in any way with counsel or
23 with anybody else after the other twelve jurors have
24 returned to the courtroom with their verdict. Will
25 you please not discuss it with anybody?

1 Thank you very much for your thoughtfulness
2 in sitting with us, and my only request is that you
3 can't join the other members of the jury in their
4 deliberations.

5 Thank you both. You are now excused.

6 Counsel and I will arrange -- make sure we have
7 the exhibits you jurors are entitled to see, but you
8 may retire now and commence your deliberations. I
9 think the Clerk has arranged for lunch to be brought
10 up for you.

11 Jury excused, and we're in recess.

12 (Jury excused.)

13 THE COURT: Counsel had an opportunity to review
14 all the exhibits?

15 MR. MERSKY: Yes. I put out all my exhibits
16 before summation.

17 MR. SCHULMAN: Yes, similarly.

18 THE COURT: Why don't you put them all together
19 and give them to the marshal so they're available to
20 the jury?

21 MR. SCHULMAN: Fine.

22 MR. MERSKY: Okay, fine.

23 Would it be permissible if I put mine together
24 in one folder, and "Defendant's Exhibit" on the outside
25 of the folder so they don't get confused?

1 MR. SCHULMAN: If we just send them all
2 together then --

3 THE COURT: It seems proper if they all go in
4 in one bunch. They're going to be mixed up anyway as
5 the jury looks at them so I suggest you send them all
6 in in a bunch.

7 MR. SCHULMAN: Your Honor, the back of this
8 photo, composite, is not in evidence. Perhaps we
9 should tape --

10 THE COURT: It seems to me there ought to be
11 some Scotch tape available that you can put on the
12 back of that.

13 MR. SCHULMAN: I see some right there.

14 THE COURT: Let Mr. Mirsky see what you are
15 doing. Put some seals on it so you can make sure it's
16 not replaced.

17 All right, if you have any question about the
18 exhibits, let me know.

19 MR. SCHULMAN: Fine, your Honor.

20 MR. MIRSKY: Be back at 2:00? You want us
21 back at 2:00?

22 THE COURT: Yes, I think so.

23 MR. MIRSKY: All right, we'll wait here.

24 THE COURT: Okay.

25 (Luncheon recess.)

1PM1
PA/JW

1 (Time noted, 3:55 p.m.)

2 THE COURT: Let the record show that both
3 Counsel and Defendant are present. I have a note
4 from the jury, and I will read it, "May we have the
5 McGuinness testimony."

6 So, I've asked the Clerk have the Reporter
7 come in and read Mr. McGuinness' entire testimony
8 they've asked for. Where is it in the transcript?

9 MR. SCHULMAN: 734, and it runs to 811.

10 THE COURT: Well, my problem is that we may
11 get into trouble if we try to pick out what they
12 want. Now, if counsel are willing to try to narrow
13 it down, I'd be willing to do so. But in the
14 absence of agreement among counsel or between counsel
15 I'm reluctant to do it.

16 MR. SCHULMAN: I can't imagine, your Honor,
17 how we can narrow it based on that note. It may
18 be too much to ask the jury.

19 MR. MIRSKY: We might as well read the whole
20 thing.

21 THE COURT: I think what I will do, I will
22 ask the Reporter to read the whole thing, and have
23 the jury instruct us if after they have enough they
24 want him to stop; is that satisfactory?

25 MR. SCHULMAN: Yes, your Honor.

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MR. MIRSKY: Yes, your Honor.

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THE COURT: All right, we will bring the jury

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in.

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MR. SCHULMAN: Your Honor, of course colloquy

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will be deleted by the Reporter.

6

THE COURT: Yes.

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(Whereupon the jury entered the courtroom.)

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THE COURT: Ladies and gentlemen, I have a

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note which I will read for the Reporter, "May we

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have the McGuinness testimony." That's what you

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want?

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(Whereupon the jury replied in the

13

affirmative.)

14

THE COURT: Now, I should tell you, ladies

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and gentlemen, that this testimony is 76 pages

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long. I'm not going to try to pick it out to tell

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you what you want or ask you what you want. I'm

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going to have the reporter start reading it. Who

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is the Foreman, incidentally?

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(Whereupon Juror Number One replied in the

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affirmative.)

22

THE COURT: Now, Miss Foreman, if the time

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comes when you've got the information that you want

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out of this testimony, then you let us know.

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Otherwise I'll have the Reporter read the entire

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1 seventy six pages. That's the only way that we
2 can do it to give you the complete picture. Once
3 you've got the information you want, you let me
4 know. Otherwise he'll read the entire testimony.

5 (Whereupon the testimony of McGuinness was
6 read to the jury beginning at Page 734, Line 17
7 through 785, Line 23.)

8 (Whereupon the Foreman of the jury indicated
9 they had received sufficient testimony.)

10 THE COURT: Have you heard everything you
11 want?

12 (Whereupon the jury replied in the affirma-
13 tive.)

14 THE COURT: Are all the jurors satisfied
15 you've heard everything you want?

16 (Whereupon the jury replied in the
17 affirmative.)

18 THE COURT: All right, you may resume your
19 deliberations.

20 THE CLERK: One-page document marked for
21 identification as Court's Exhibit 1.)

22 (Whereupon the jury left the courtroom.)

23 THE COURT: I think the record should show
24 the pages you read, Mr. Reporter, so we have an
25 idea where you indicate you started and where you

finished.

(Whereupon a recess was taken.)

(Continued on next page.)

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10 Now we have a motion concerning the composite
11 photograph or composite drawing, I should say, and the
12 testimony concerning this drawing is that it was made
13 by an officer from the New York City Police Department
14 on June 4, the day following the robbery. The police
15 officer apparently, at least as far as we know from the
16 testimony, originally talked to Joyce Pyle, I believe
17 her name is.

18 MR. SCHULMAN: Correct.

19 THE COURT: And as a result of that discussion,
20 he came up with a proposed drawing, which thereafter
21 was showed to Mr. Gleason and Mr. Gleason testified that
22 he suggested some changes in the drawing. I think he
23 specifically said he suggested that the face be narrowed,
24 more narrowed than it was and that was done.

25 Now, Mr. Gleason testified that the drawing was

1 an accurate likeness of the robber. Miss Pyle testified
2 also and Mrs. Criscione testified also, that it was an
3 accurate likeness although Mrs. Criscione took no part
4 in the preparation of it. I am satisfied that that is
5 probably as good a description of the robber as you
6 could get. I think it's admissible under the Federal
7 Rules of Evidence, specifically 801, Sub-Division
8 D (1)(c), I think it is. I don't have the thing right
9 here. 801 --

10 MR. MIRSKY: D.(1)(c).

11 THE COURT: D.(1)(c), yes. Your memory is better
12 than mine. I see nothing suggestive about it.
13 Certainly inasfar as Miss Pyle is concerned and Mr.
14 Gleason, this in fact is their handiwork. Although they
15 didn't do the actual drawing themselves, it was done
16 under their direction, at their suggestion, and both
17 of them testified they were satisfied that when they
18 were through, it was an accurate likeness.

19 I would just refer to Judge Friendly's statement
20 in United States against Mesina (ph), where he said at
21 page -- this is at 507 Fed. 2d, 73, at page 76, and I
22 quote, "The only possible instance of collaboration we
23 can find in the record" parenthesis "(and we have some
24 about that there was any collaboration even there)" end
25 of parenthesis -- "was the effort of Mantionie and
Bavario to make composite drawings, an enterprise in
which, in contradistinction to selection from a book

1 of photographs or a line-up, collaboration would serve
2 the interests of accuracy."

3 I also refer to Judge Mahon's (ph) opinion in
4 United States against Deegan, 202 Fed. Supp. 968, at
5 974, where he said, and I quote, "More significantly,
6 the victim guided the police artist in his description
7 of a composite picture. Such a picture, the embodiment
8 of the witnesses" -- that's plural witnesses -- "mental
9 image, is even more clear and convincing evidence of
10 an independent origin for the in-court identification
11 than the prior selection of a photograph. We think
12 these procedures provided adequate safeguards against
13 irreparable mistaken identification, for the witnesses
14 descriptions and the composite picture were presented
15 to the jury."

16 So I am prepared, if a proper foundation is laid
17 during the trial, to admit the composite photograph
18 into evidence.

19 MR. SCHULMAN: May I inquire as to your Honor's
20 views as to what will be required as to foundation?

21 THE COURT: I'll leave that up to you, counsel.

22 MR. SCHULMAN: Okay.

23 THE COURT: Now, the next is the motion with
24 regard to witness identification. I laid notes around
25 but I have trouble finding them always. We had three

1 witnesses testify, in addition to the F.B.I. agent,
2 Mr. DiBona. The robbery took place on June 3, 1976.
3 Mr. Gleason testified that when he pulled into the
4 parking station, he was accosted by an individual, who
5 has been called the perpetrator to this point, and
6 that's probably as good a definition as any, who called
7 over and asked -- called him by name as a matter of
8 fact, Michael, and asked on several occasions if he
9 recognized him. And Mr. Gleason said that when he said
10 he did not recognize him, the perpetrator dropped a
11 newspaper which he was holding in front of him and in
12 his hand he held a gun. Mr. Gleason was directed to
13 get into the perpetrator's automobile and he sat on
14 the passenger side.

15 Without going into the details as to the
16 conversation between them at the time which involved
17 a hand grenade and a walkie-talkie, it appears that
18 Mr. Gleason was in the car within a space of two or
19 three feet from the perpetrator for a period of some
20 three to five minutes. They then, at 8:55 apparently,
21 decided -- strike the decided -- began their approach
22 to the bank and they entered the rear door of the bank,
23 following which Mr. Gleason called Miss Pyle and
24 Miss Criscione to come over. The three bank employees
25 and the perpetrator then went into the vault.

1 The testimony is that the vault was well lighted
2 and that -- by Mr. Gleason -- I'm just trying to find
3 his testimony in a hurry here, but my recollection was
4 that Mr. Gleason said he had an opportunity for another
5 two or three minutes to observe the defendant or not
6 the defendant, strike that, -- the perpetrator inside
7 the vault, that he -- there was some difficulty getting
8 the vault door open, that is, the inner door, because
9 Miss Criscione didn't have her reading glasses with her.
10 But eventually the door was opened and two bags were
11 removed by Mr. Gleason, given to the perpetrator, who
12 then left. That was the last he was seen by anybody.

13 The following day, -- well, on the same day,
14 police came and descriptions of various sort were given.
15 Mr. Gleason said that his recollection was that the
16 perpetrator was five feet eight inches tall, about 150
17 pounds, had dirty blond hair, a brown simulated leather
18 jacket. He recalls having mentioned no scars, complexion
19 about the same as the witness's, Mr. Gleason. The next
20 day -- well, perhaps I'd better go to the description
21 given by the other two.

22 Miss Pyle, as I recall, said that she was staring
23 at the perpetrator because -- when he came into the bank,
24 because he shouldn't have been there and that she also
25 spent some two to three minutes with him in the vault.

1 H. description to the police was, as she recalled it,
2 that he was five feet ten, had blond hair, blue eyes,
3 a brown leather jacket, brown shoes and a green shirt.
4 That's what my notes say.

5 Now, Miss Criscione recalls the description which
6 she gave was that the perpetrator had dirty blond hair.
7 She didn't recall the color of his eyes. That she gave
8 a height of either five foot eight inches or five foot
9 nine inches, and age of approximately 30 years. She
10 said there was an area which was not natural skin tone,
11 a darker area, on his cheek, which was darker than hers.
12 She also noticed that the perpetrator was bowlegged.

13 On June 4, the -- an artist from the Police
14 Department came, talked first with Miss Pyle, then with
15 Mr. Gleason and I think Miss Criscione said that he
16 also talked to her, but she had no suggestion. Miss
17 Pyle gave him, apparently, suggestions for the drawing
18 and Mr. Gleason then suggested some changes. All three
19 witnesses were agreed that the final drawing was an
20 accurate representation of the robber.

21 On June 9, -- can I see those photographs,
22 please?

23 MR. SCHULMAN: Yes, your Honor. I'll hand these
24 up to the bench.

25 THE CLERK: Six photographs.

1 THE COURT: On June 9, the three witnesses were
2 shown a set of photographs, six photographs, marked as
3 Exhibit 2A through F. Mr. Gleason selected Exhibit 2C,
4 which we're all agreed is a photograph of the defendant.
5 Miss Pyle also selected photograph 2C, and Miss Criscione
6 also selected 2C.

7 Now, there is some indication, some testimony,
8 about the background in the photograph 2C. My
9 recollection is that the -- at least two of the wit-
10 nesses testified after -- and they were questioned
11 extensively -- that it appeared that background might
12 be a bank. Mr. Gleason, as I recall, said after he was
13 examined by Mr. Mirsky, that the sign which appears on
14 the lefthand side of the photograph might be a sign
15 that was in the Chemical Bank itself. Miss Criscione,
16 as I recall, mentioned the appearance of a rope, which
17 I am frank to admit, I don't see, but she mentioned
18 the appearance of a rope as indicative of the fact that
19 it might have been taken in a bank. But none of the
20 three witnesses testified that he or she made this
21 selection on the basis of the background. They made
22 the selection on the basis of the individual involved
23 and I so find.

24 ~~Now on~~ June 23, a series of eight photographs
25 were shown to the witnesses, which are Exhibits 3A
through H. Mr. Gleason selected Exhibit 3D, which I

1 think is agreed was the defendant. Miss Pyle could not
2 make an identification of this exhibit, am I correct?

3 MR. SCHULMAN: That's correct, your Honor.

4 THE COURT: And Miss Criscione also picked
5 Exhibit 3D.

6 On August 12th, a line-up was held. Mr. Gleason
7 selected the defendant from the line-up after he had
8 asked him to repeat a phrase, I think "Do you recognize
9 me?" Miss Pyle selected number two in the line-up,
10 who was an F.B.I. clerk named Cunningham. Apparently
11 it was thereafter -- she was thereafter advised she
12 made a wrong selection and made a second choice, which
13 happened to be the defendant. Miss Criscione picked
14 out number four and that was the defendant. My
15 recollection is that she also asked for the defendant
16 to say something.

17 MR. SCHULMAN: I believe --

18 THE COURT: Yes, she asked -- I think everyone
19 in the line-up, as I recall, to say "You only have 5
20 seconds."

21
22 (continued on next page)
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1 MR. MIRSKY: But she didn't come out from the
2 door. The other one did, Gleason.
3 THE COURT: Yes. And she said that she was
4 certain of his voice when she heard it.
5 MR. MIRSKY: Yes.
6 THE COURT: She also said that she saw his
7 legs in the lineup and he was bow-legged in the lineup,
8 the individual that she picked out was bow-legged.
9 MR. MIRSKY: Yes.
10 THE COURT: In December, the exact date is not
11 clear, two more sets of photographs were shown.
12 Exhibits 6 and 7, Mr. Gleason chose the defendant in
13 both photographs, as I recall.
14 MR. MIRSKY: Yes.
15 THE COURT: One was 6C, which I believe --
16 MR. MIRSKY: Lineup.
17 THE COURT: You'd better let me see that.
18 MR. SCHULMAN: 6C would be the mug shots.
19 7 --
20 THE COURT: Exhibits 6 and 7 were both shown
21 on the same day.
22 MR. SCHULMAN: 6C and 7B.
23 THE COURT: Pardon?
24 MR. SCHULMAN: 6C and 7B.
25 THE COURT: That's what my notes show. They are

1 both photographs of the defendant.

2 MR. MIRSKY: One of them being a cut-up of
3 the lineup..

4 THE COURT: Pardon?

5 MR. MIRSKY: One of them being a cut-up of the
6 lineup.

7 THE COURT: Yes. My recollection is 7 is the
8 lineup, with each individual defendant separately shown.

9 MR. SCHULMAN: That is correct. Cut out
10 separately or each individual person in the lineup.

11 MR. MIRSKY: Did you mention that Gleason in
12 identifying Exhibit 4 saw some additional photographs?

13 THE COURT: Oh, yes. I should say that
14 following his inspection of Exhibit 3, he asked for
15 additional pictures of the defendant. As I recall
16 he said he wanted to look at them from a different
17 angle.

18 MR. MIRSKY: That is right.

19 THE COURT: So, he was shown Exhibits 4A
20 through D.

21 MR. MIRSKY: That is right.

22 THE COURT: Those were all photographs of the
23 defendant, taken -- one as I recall was a larger
24 photograph from which the smaller one was taken.

25 MR. MIRSKY: No. There were three different

1 smaller ones and one eight by ten enlargement of the
2 defendant coming down some stairs with the bag over
3 his arm.

4 THE COURT: I thought there was some testimony.
5 Let me see this.

6 MR. SCHULMAN: I don't believe they are all
7 taken from the same photograph your Honor, but they --
8 they are all of the defendant.

9 THE COURT: I guess not. I stand corrected.
10 It was not an enlargement, but anyway, Exhibits 4A
11 through D were shown to Mr. Gleason. He identified
12 them all as likenesses of the robber.

13 Then going back to December, nine photographs
14 were shown or have I already covered that?

15 MR. SCHULMAN: You began to, I believe, your
16 Honor.

17 MR. MIRSKY: You talked about Exhibits 6 and 7.

18 THE COURT: Yes.

19 MR. MIRSKY: 7, the lineup, I believe 6 the mug
20 shots.

21 THE COURT: Those were the ones that were shown
22 in December.

23 MR. SCHULMAN: That is correct.

24 THE COURT: Mr. Gleason made the selections
25 which I have already noted. Miss Pyle originally chose

4 1 7F, who was not the defendant. She testified
2 that 7B was a second possibility. It's not clear
3 from my notes whether she said so at the time or
4 whether she said so from the witness stand.

5 In any event, she chose 7F originally.

6 MR. SCHULMAN: Your Honor, I believe the testimony
7 is -- of Miss Pyle was that she came to my office at
8 sometime after the lineup and stated that -- and sometime
9 after she had been told that in fact No. 7F was
10 Agent Clark Kavanaugh and she then proceeded to say--
11 she testified that she then said this was somebody
12 else in the lineup she thought was the reason and she
13 asked to see the pictures again.

14 THE COURT: If there is any question about it,
15 we can read her testimony. I want to be sure the
16 finding is correct.

17 MR. MIRSKY: Frankly, I don't dispute what
18 he just said. I think it jibes with essentially
19 what you have just said and I think the two are
20 essentially what occurred.

21 THE COURT: I believe so, and Miss Criscione --
22 excuse me.

23 MR. MIRSKY: Your Honor, so that the record could
24 be clear on this, could you make a finding as to the
25 similarity of the photos that were shown in the first

1 and second photo-spreads to Mr. Gleason and to Miss
2 Pyle Miss Criscione?

3 THE COURT: I'll have to look at those photos
4 again.

5 MR. MIRSKEY: I'd also -- I think the Court is
6 aware of this fact, the defendant is the only person
7 who is -- who reappears in all photo spreads and in
8 the lineup and I'd ask that the Court make a finding
9 on that.

10 THE COURT: I think the record does indicate,
11 and you correct me if I'm wrong, that the defendant
12 is the only individual who appears in both of these
13 spreads?

14 MR. SCHULMAN: Your Honor, I believe that is
15 correct. However, I think the witness has testified
16 or at least, one witness testified that they thought
17 maybe one or two of the pictures had reappeared.

18 MR. MIRSKEY: That was as to Exhibit 6. There
19 was testimony by Gleason that he thought one of the
20 individuals in Exhibit 6, the color mug shot may have
21 been also present in the lineup, although he was not
22 sure. But I think the fact is that -- and I would ask
23 the Court to take note of that, that the defendant is
24 in fact the only person who has reappeared.

25 THE COURT: There is no question about that, is

6 1 there?

2 MR. SCHULMAN: I don't think so your Honor.

3 THE COURT: Of course, as far as the similarity
4 or dissimilarity of photographs is concerned, looking
5 at Exhibit 2, five of the photographs of the persons
6 photographed have moustaches. One however appears to
7 have a goatee, in addition, which doesn't match any
8 of the description given of the perpetrator of the
9 crime.

10 And one has no moustache at all, but of the
11 remaining ones, omitting those two, then there is
12 one other one where the hair is longer than was
13 described and I refer to Exhibit 2D. The other three,
14 Exhibits 2C, 2B, and 2A I find reasonably similar, and
15 with regard to Exhibits 3, I find much more similarity.
16 All of the individuals have moustaches. None of them has
17 hair which is grossly different from the perpetrator --
18 description of the perpetrator.

19 As far as I can see, none of them is of an age
20 which is grossly different than what was testified to.
21 So I don't find any unfair dissimilarity between the
22 individuals who appear in Exhibits 3.

23 MR. SCHULMAN: The record is complete your
24 Honor. Will you also make a finding as to the indivi-
25 duals portrayed in the lineup?

6

1 THE COURT: And I certainly make the same finding
2 with regard to the lineup which is Exhibit 5. While
3 the photograph speaks for itself, it is obvious
4 that all of the persons shown are of approximately si-
5 milar age group. They all have moustaches, all have
6 reasonably short hair.

7 In other words, there is nobody who has an
8 unusual head of hair, insofar as length or coloration,
9 for that matter is concerned. There is no great
10 discrepancy in height or weight. I think that -- and
11 find that the lineup was a fair presentation so far as
12 request to pick out the defendant was concerned.

13 MR. SCHULMAN: Thank you your Honor.

14 MR. MIRSKY: I think that leaves only the
15 colored mug shots because the other photos are the
16 lineup itself.

17 THE COURT: All right. Of the mug shots which
18 are Exhibits 6, various numbers, various letters --
19 there are three individuals without moustaches and the
20 remaining ones all have moustaches, as did the perpe-
21 trator.

22 I find once again, that the pictures certainly of
23 the ones with the moustache are not unreasonably
24 dissimilar to the defendant so as to make this an
25 unfair presentation.

1 In so holding, I don't hold that showing of the
2 ones without moustache is unfair. Moustaches come and
3 go and it's not beyond the realm of possibility that
4 a person who had a moustache on the day of a crime
5 might have removed it. So I find nothing unfair in
6 including a number of photographs in this exhibit of
7 individuals without moustaches.

8 The age group is approximately the same. It
9 appears that the coloration and height is approximately
10 the same. So, I find nothing suggestive or unfair
11 in those photographs.

12 Now, the testimony was consistent from all the
13 witnesses that no suggestions were made to them by
14 anybody. Specifically not by anybody connected with
15 law enforcement agencies concerning selection of any
16 individual in either the photographs or the lineup.
17 The witnesses all testified they were instructed not
18 to discuss their identification with other members of
19 the bank, other employees of the bank, and they had
20 not done so.

21 I find that the lineup, the actual position of
22 the individuals in the lineup, was not as shown in
23 photograph Exhibit 5.

24 MR. SCHULMAN: Five, I believe, your Honor --

25 THE COURT: The record will show that Court and

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counsel and the defendant went down and examined the lineup room, at which time Agent DiBona testified where the individuals in the lineup were standing and it's my recollection that they were some ten feet from the wall, which shows in the background of the photograph Exhibit 5, with the lettering on the top of a bulletin board, which is -- has been bothersome to defense counsel, and I find, therefore, that the lineup did not take place in that position shown in the photograph and that the individuals were placed in that position in order that the photographer could take a complete photo.

Now, I think the latest pronouncement of the Supreme Court on the admissibility of identification photographs in evidence is Manson against Brathwaite, if that's the way you pronounce it, which has not been officially reported but it's in the slip opinion. That's M-A-N-S-O-N, defendant's name is B-R-A-T-H-W-A-I-T-E. The Court reviewed at some length the law with regard to identification, pointed out that the first inquiry was whether it had been impermissibly suggestive, and second, whether under all the circumstances the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

The Court then went on to point out that in the

1 final analysis, reliability is the lynchpin in
2 determining the admissibility of identification
3 testimony. And they then set forth the various factors
4 which should be considered.

5 These include, according to the Court, the
6 opportunity of the witness to view the criminal at
7 the time of the crime, the witness' degree of attention,
8 the accuracy of his prior description of the criminal,
9 the level of certainty demonstrated at the confrontation,
10 and the time between the crime and the confrontation.
11 Applying those tests to our particular case, I find
12 first that the witnesses, particularly Gleason and
13 Pyle, had ample opportunity to observe the perpetrator
14 at the time.

15 Mr. Gleason spent some three or four minutes
16 seated next to him in the front seat of the perpetra-
17 tor's automobile, and another three or four minutes
18 inside the vault which all witnesses are agreed was
19 lighted.

20 Miss Criscione did not get into as great a
21 detail as how long she had looked at the perpetrator,
22 but there is no question that she did look at him. She
23 said she did so particularly when he made some mention
24 of the fact that she had 35 seconds or else. The degree
25 of attention -- I think, at least two of the three testified

1 that they were looking. the accuracy of the description -
2 outside of the height, which was testified I think
3 between five-eight and five-ten -- the remainder of the
4 description is I think, my impression, quite good,
5 particularly the testimony of Miss Criscione, I believe
6 it was, with regard to a dark area on the perpetrator's
7 cheek, which she described as -- I think she used the
8 word ruddy or maybe it was Miss Pyle who used the
9 word ruddy, but in any event --

10 MR. MIRSKY: M ss Pyle, it's Miss Pyle.

11 THE COURT: But Miss Criscione definitely
12 mentioned the darkened area on the perpetrator's
13 cheek. And that she was very sure of that and all
14 three witnesses were very sure of their identification
15 in Court.

16 It should be noted that the original photo-
17 identifications were made very shortly after the
18 incident occurred. The composite drawing in particu-
19 lar was made the following day and the first set of
20 photographs was made within a week, six days as I
21 recall.

22 So, I am satisfied and find that there was
23 nothing impermissibly suggestive or unfair about any
24 of the photographic displays or the lineup and I find
25 that there was sufficient evidence of independent
recollection to support the in-Court identification

1 by all three parties and also sufficient evidence as to
2 the pre-trial photographs and the lineup. So much
3 for that.